No. 18833

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM ROSS PHILLIPS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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WILLIAM ROSS PHILLIPS,

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UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.
JURISDICTION AND STATEMENT OF THE CASE.

The Federal Grand Jury for the Southern District of California returned Indictment No. 32056 on April 3, 1963, charging appellant in fifteen counts with causing the interstate transportation of counterfeit securities in violation of Title 18, United States Code, Section 2314. Appellant was tried by a jury and found guilty on all fifteen counts on April 22, 1963. On May 20, 1963, appellant was sentenced to ten years on each count to run concurrently, and on May 22, 1963, he gave notice of appeal.

The jurisdiction of the District Court was based upon Title 18, United States Code, Section 3231, and this Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.

II.
STATUTE INVOLVED.

Title 18, United States Code, Section 2314, provides in pertinent part:

> "Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited;
>
> * * *
>
> "Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

III.
STATEMENT OF FACTS.

The testimony of Ruby Jean Shroyer, Gloria Lindauer, Julia Yenerich, Janette Wheeler, Everett Statford, Gay Bushee, and John Pepperling, employees of various banks in Arizona and California, established that the fictitious United California Bank personal money orders described in Counts One through Fifteen of the Indictment [Exs. 1-15] were cashed at various banks in the Phoenix, Arizona vicinity on about June 22, 1962, and were subsequently transmitted through normal banking channels to the United California Bank in Los Angeles, California. [R. T. 11-38.][1]

Mrs. Shroyer identified Robert Gene Roux, a subsequent Government witness, as the man who opened a savings account at the home office of the Valley National Bank in Phoenix on June 21, 1962, and obtained a savings passbook in the name of Walter G. Stewart.

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[1]R. T. refers to the Reporter's Transcript.

[R. T. 12-14.] This passbook was presented to Mrs. Lindauer as identification by a man who cashed a money order [Ex. 9] at her bank. [R. T. 17-18.]

Mrs. Yenetich identified George Edward Myers, another Government witness, as the man who cashed a money order [Ex. 2] at her bank, and at the same time presented as identification a driver's license [Ex. 19] in the name of Earl P. Lorcam. [R. T. 20-21.] Mrs. Wheeler also identified Myers as the man who attempted to cash a money order [Ex. 20] at her bank using the same driver's license [Ex. 19.] as identification, but who departed from the bank leaving the money order and driver's license behind. [R. T. 21-24.]

Roy Delgado Sanchez testified that appellant Phillips once asked him if he knew of, or could find, someone with a print shop in Tijuana, Mexico. Sanchez made inquiries and about a week later drove Phillips to Tijuana to meet a Bobby Gomez. Gomez introduced them to Horatio Sandoval, after which Phillips asked Sandoval if he could print checks and Sandoval replied that he could. Phillips asked Sandoval to print some checks for Desilu Productions. About a week later, Sanchez and Phillips returned to Tijuana where Phillips viewed the finished checks and said they were good. Phillips gave Sandoval some money and started back to Los Angeles in his own car. Sanchez saw the Border Patrol stop Phillips' car. Later, Phillips told Sanchez that the checks had been confiscated. [R. T. 40-46.]

Subsequently, Phillips and Sanchez visited Sandoval on several occasions concerning different kinds of checks that were being printed. Phillips talked with Sandoval about supplying certain printing equipment Sandoval didn't have, and later Phillips gave him the

equipment. [R. T. 46-48.] In about April, 1962, Phillips came to Sanchez' house with three different typewriters and a check writer. When Gomez brought a batch of checks there Phillips would fill in the faces of the checks using this equipment. [R. T. 48-49.]

Sometime in June, 1962, Gomez brought United California Bank personal money orders to Phillips at Sanchez' house. The amount was already printed on the face of these money orders. [R. T. 49-51.] Phillips mentioned that it would be difficult to pass the money orders without magnetic ink on the coded numbers at the bottom. He said he would give the money orders to his boys to pass out. [R. T. 76-77.]

Robert Gene Roux testified that he first met Phillips in about March, 1962, at a motel. On this occasion Phillips supplied Roux and a companion, Doyle Boss, with some checks and told them to cash them and make some money, which Roux did. [R. T. 79-82.] Afterward, Roux obtained some North America Aircraft checks from Phillips who said that he had obtained them in Tijuana. [R. T. 83.]

Once, in about May, 1962 Roux was with Phillips in the Covina, California area when Phillips entered a United California Bank and bought a money order. Phillips then returned to the car, opened a package and displayed a batch of money orders which he asked Roux to compare with the one just purchased. Roux noticed that they looked the same. He identified Exhibits 1 through 16 as being the type of money orders Phillips showed him in the car. Phillips told Roux that they would pass these money orders. [R. T. 83, 84.]

Subsequently, Phillips showed the money orders to George and Don Myers and plans were made for cashing them. The Myers brothers were to drive to Las Vegas, Nevada, and from there to Phoenix where Roux and Phillips would meet them. Phillips gave Don Myers some of the money orders. The next day Roux flew to Phoenix alone but failed to locate the Myers brothers so he returned to Los Angeles and contacted Phillips. Phillips and Roux then flew together to Phoenix and located George and Don Myers. [R. T. 90-91.]

In Phoenix, Roux opened a savings account at the Valley National Bank, and obtained an account book, as well as a map which showed the location of every branch of that bank in the city. George Myers rented a car which Don Myers and Phillips alternated in driving from one bank branch to another. George Myers and Roux were given a money order by Phillips, which they would cash. Upon returning the proceeds to Phillips he would give them each another money order to cash. While cashing the money orders, Roux used as identification, the savings account book, and a fictitious driver's license given him by Phillips. Once, in a gas station, Phillips stole a gasoline credit card bearing the name "John Swift" and said that it would make good identification. Phillips and Roux had arranged to split the money order proceeds 50-50. Roux got about $1400 from the Phoenix operation, and identified Exhibits 7, and 9 through 16, as money orders he endorsed and cashed there. [R. T. 92-95.]

Roux later traveled to other cities, such as St. Louis, Missouri, Kansas City, Missouri, Kansas City, Kansas, Oklahoma City, Oklahoma, and Reno, Nevada, to cash

money orders which Phillips had given him. In a hotel in St. Louis, Roux saw Phillips in possession of some of the money orders. Roux gave most of the money from those he cashed to Phillips. [R. T. 96-98.]

George Edward Myers testified that in about June, 1962, his brother Donald introduced him to Phillips in a Hollywood, California apartment. On this occasion, Phillips was seated by a coffee table and was punching out IBM holes in United California Bank personal money orders similar to Exhibits 1 through 16. George Myers was told that he would cash these money orders. [R. T. 132-133, 148.]

A day or two later George Myers and his brother went around cashing money orders. At one bank, an employee's suspicion caused George to walk out and leave a money order and a fictitious driver's license behind. George went to a motel to wait for his brother, but was joined there by Phillips who asked him if there was anything about the money order that made the bank employee suspicious of it. At this time, George gave Phillips a savings account book that he had been using as identification. [R. T. 134-136.]

A short time later, in West Covina, George and his brother Donald met Phillips and Robert Roux. They discussed an out-of-town trip to cash checks and planned to meet later in Phoenix. George and Donald Myers drove to Las Vegas and from there went to Phoenix where they met Roux and Phillips. George rented an automobile and the four men drove about the city from bank to bank—most of which were branches of the Valley National Bank. Phillips and Donald took turns driving; George and Roux were in the back seat. George

was given a money order to cash, and when he gave the proceeds to Donald, the latter would give him another money order. George was given about 25% of the money he took in. For identification, he used a fictitious driver's license given him by Donald. George Myers identified Exhibit 19 as the license, and Exhibits 1 through 6, and 8, as money orders he endorsed and cashed in Phoenix. [R. T. 136-144.]

George Myers traveled to other cities, such as Reno, Philadelphia, and St. Louis to cash money orders. Phillips was with him in St. Louis and Reno. [R. T. 145-146.]

Mrs. Jo Ann Roux, wife of Robert Roux, testified that she first met Phillips in West Covina shortly after her husband was arrested in a motel, and she was detained for questioning. Phillips picked her up in his car a short distance from the police station and asked why Gene Roux and Fred Holzer had been arrested. That evening, Phillips drove Mrs. Roux to Los Angeles and on the way he explained his check passing activity by stating that he had fictitious checks printed in Tijuana, and that he also had phony I-D cards and driver's licenses. Phillips named several people who were passing checks for him, including Fred Holzer and Charles Abshire. [R. T. 153-158.]

At a later time, when her husband was in jail, Mrs. Roux went to live at Phillips' house for a little over a month. During that time she overheard conversations about a man named Craig in New York, and that when Phillips went to New York he would take some checks with him. Phillips, and later Mrs. Phillips did leave for New York. On his return Phillips was very disgusted and said that everything was a failure because Craig

had taken off with some money, and that Craig had been arrested. [R. T. 159-161.]

Mrs. Roux heard Phillips explain various aspects of his check-passing scheme to Donald Myers on at least two occasions. [R. T. 161-162.] While at Phillips' home, Mrs. Roux received calls from a deep voiced male who Mrs. Phillips identified as a detective that worked for Phillips. [R. T. 162-163.] Mrs. Roux once accompanied her husband to St. Louis, and saw Phillips in a hotel room there when he had a briefcase containing blue checks like Exhibits 1 through 16. [R. T. 163-164.] Once when Mrs. Roux was arguing with her husband about his involvement in the check ring, Phillips told her she couldn't scare him and that he could have her taken care of. [R. T. 166.]

Mr. A. M. Barr, a Los Angeles Police Officer assigned to forgery investigation testified that on October 18, 1962, in Monterey, California, he had a conversation with Phillips, during which Phillips admitted that the United California Bank personal money orders were printed for him in Tijuana and were passed in Phoenix by Roux and Don Myers. Later, Phillips said it was not Don but George Myers. [R. T. 196.] Phillips admitted that he had received part of the proceeds from the money orders that were cashed there and that the same operation had been conducted in St. Louis and New York. Phillips also said that Officer Irwin had been hounding him for money, and that Irwin would have to share the blame. [R. T. 188-192.]

Phillips also told Barr that he didn't make much money from the check operation because he had to pay bondsmen and attorney fees, and that he also paid Irwin for police protection. In particular, Phillips said he paid Irwin $5,000 to get himself released from custody in San Diego. [R. T. 192-194.] Phillips said that Irwin told him where fictitious checks could safely be passed. [R. T. 195.] Phillips never mentioned that Irwin had threatened to return him to prison as a parole violator if he didn't cooperate with Irwin. [R. T. 200.]

John A. Kelleher, special agent of the F.B.I., testified that he interviewed Phillips on October 18, 1962, in Monterey, California, at which time Phillips signed a document [Ex. 25] confessing that he obtained about $270,000 in fictitious United California Bank personal money orders from a printer in Mexico, and that he went to Phoenix with George Myers and Roux where they were cashed. He also admitted that he received part of the proceeds. [R. T. 209-211.]

Appellant Phillips testified in substance that he was forced into managing the fictitious check operation against his will by the threats of Police Officer Irwin of West Covina to return Phillips to prison as a parole violator if Phillips did not comply with Irwin's wishes. [R. T. 218-244.] He admitted having the checks printed in Mexico, and distributed in various cities around the country; he also acknowledged that he received money from this activity. Phillips named at least six dif-

ferent kinds of checks that were used by the check ring. He acknowledged that he supplied fictitious identification for his check passers, and that he knew that the cashing in other states of checks drawn on California banks would result in the interstate transportation of such checks. [R. T. 244-256.] Phillips admitted he never told his parole officer, the F.B.I. or any other federal officer that Irwin had threatened him. [R. T. 260, 264.] He named about a dozen persons as being members of his check ring. [R. T. 290-291.] Phillips acknowledged having been convicted of five prior felonies. [R. T. 293-299.] Mrs. Janet Phillips, wife of appellant, testified in substance that Officer Irwin was the one behind the check ring. [R. T. 301-317.]

It was stipulated that Officer Hart of the Baldwin Park, California, Police Department would testify that in the Spring of 1962 he and other officers arrested Phillips and his wife on check charges, but released them when Irwin came to their house and said that Phillips was working undercover for him. [R. T. 317-318.]

Joseph Cantrelle testified that Phillips asked him to listen to a telephone conversation with Officer Irwin. Thereafter Phillips dialed the West Covina Police Department and told Irwin he didn't want to go to Arizona to pass checks because it would be a federal violation. Irwin told Phillips he had better go if he valued his life and his freedom. [R. T. 324-327.]

In rebuttal, Robert Roux testified that he had never heard Phillips mention that Irwin was forcing him to engage in check passing activity, but that Phillips had

told him that he was paying Irwin for information. [R. T. 333.]

Argument in the case concluded on Thursday afternoon, April 18, 1963. On Friday morning, April 19, 1963, appellant did not appear in Court. Mrs. Phillips was called as a witness by the Court in the jury's absence, and testified that Phillips had accompanied her to the courthouse and told her to go on in and he would be right there. [R. T. 379-381.] The Court continued the case until Monday morning, April 22, 1963, because of the possibility that appellant had been unavoidably absent. [R. T. 382.] On Monday, April 22, 1963, appellant was again absent when Court convened. Appellant's bail bondsman, through appellant's attorney, advised the Court that he had heard from Phillips over the week-end, and that Phillips had said he would be present in Court on Monday morning, April 22, 1963. [R. T. 389.] The Court thereafter found that appellant voluntarily absented himself from the trial. [R. T. 413.]

IV.

SUMMARY OF ARGUMENT.

A. The Jury was Correctly Instructed on the Defense of Coercion.

B. The Court Properly Permitted the Trial to Proceed in Appellant's Absence.

C. The Argument of Government Counsel was Unobjectionable.

D. Evidence Bearing Upon Appellant's Offenses or His Motive, Intention, Knowledge, Plan and Design, or Showing the Absence of Coercion, Was Properly Received.

V.

ARGUMENT.

A. The Jury Was Correctly Instructed on the Defense of Coercion.

Since Appellant's Brief fails to comply with this Court's Rule 18(2)(d) pertaining to specification of error relating to instructions, the following facts are here set forth: When the Government's proposed instruction on the defense of coercion was first submitted to the Court, the following conversation took place:

> "Mr. Parsons: I think we would have to object to No. 12, the instruction under duress.
>
> The Court: Why?
>
> Mr. Parsons: I think there is some confusion in the law with reference to whether or not a threat of prosecution of imprisonment is not sufficient coercion. I think that is such a limitation on it—from the circumstances in this case I think the jury might well infer that most anything could have happened to this man, from the testimony that he has given, and I must therefore respectfully object to the giving of instruction 12." [R. T. 270-271.]

Defense counsel offered no alternative instruction on the defense of coercion and the Court gave the following instruction to the jury:

> "Duress or coercion does not excuse the commission of a crime, unless the compulsion is immediate, cannot be reasonably escaped, and is of such a nature as to induce a well grounded apprehension of death or serious bodily injury if the crime is not committed. A threat of prosecution or imprisonment is not sufficient coercion to excuse the commission of a crime." [R. T. 406.]

Before the jury retired the following inquiry was made and answer given:

> "The Court: Has the defendant any objection to the giving of any instruction or the omission of any instruction?
>
> Mr. Parsons: None." [R. T. 407.]

Rule 30, Federal Rules of Criminal Procedure, states that: "[n]o party may assign as error any portion of the charge . . . unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Painstaking compliance with this rule is required.

Lyons v. United States, 325 F. 2d 370 (9th Cir. 1963);

Brown v. United States, 222 F. 2d 293 (9th Cir. 1955);

Enriquez v. United States, 188 F. 2d 313 (9th Cir. 1951).

Therefore, the allegation of error as to the instruction in question should not be considered on appeal.

However, even if the matter is deemed to be subject to appellate review, it is obvious that the instruction given was a correct statement of the law. In *Iva Ikuko Toguir D'Aquino v. United States,* 192 F. 2d 338 (9th Cir. 1952); *cert. denied,* 343 U. S. 935 (1952), the Court of Appeals considered appellant's claim that the following instructions given upon the subject of coercion were erroneous:

> "In other words, ladies and gentlemen of the jury, this coercion or compulsion that will excuse a criminal act must be present, immediate and [im]pend-

> ing, and of such a nature as to induce a well grounded apprehension of death or serious bodily injury if the act is not done.
>
> * * * * *
>
> . . . [I]t is not sufficient that the defendant thought that she might be sent to a concentration or internment camp. . . ." (Note 11, p. 358.)

The Court noted that the instruction in question was almost identical to that approved in *Gillars v. United States,* 182 F. 2d 962 at 976, note 14 (D.C. Cir. 1950), and said:

> "The charge was a correct statement of the law upon this subject. *United States v. Vigol,* 2 Dall 346, 2 U.S. 346, 1 L.Ed. 409; *Respublica v. McCarty,* 2 Dall 86, 2 U.S. 86, 1 L.Ed. 300; *Shannon v. United States,* 10 Cir., 76 F.2d 490; *R.I. Recreation Center v. Aetna Casualty & Surety Co.,* 1 Cir., 177 F.2d 603, 12 A.L.R. 2d 230." (192 F. 2d at 358) [Italics added]

Counsel for appellant cites no cases which support his contention that a threat of any kind may be sufficient to establish a defense of duress. His argument, that the law respecting a defense of duress in civil contract cases should also be applied to such a defense in criminal cases, is not even supported by the half dozen law review notes and articles cited, and completely overlooks the policy considerations which require that persons resist coercion to commit crime to a greater degree than coercion to contract, before they are excused from responsibility.

Appellant's brief (p. 18) states that Phillip's testimony was credible, and indicates that the Court's in-

struction on duress precluded the jury from considering it. Both propositions are incorrect. The jury *was* permitted to consider appellant's story in the light of the instruction given. Further, on appeal, the evidence does *not* consist of that to which appellant and his witnesses testified, but of the evidence at trial taken in the light most favorable to the Government, together with all reasonable inferences which may be drawn therefrom. *Glasser v. United States,* 315 U. S. 60 (1942); *Bolen v. United States,* 303 F. 2d 870 (9th Cir. 1962); *Young v. United States,* 298 F. 2d 108 (9th Cir. 1962); *cert. denied* 370 U. S. 953 (1962); *Benchwick v. United States,* 197 F. 2d 330 (9th Cir. 1961; *Teasley v. United States,* 292 F. 2d 460 (9th Cir. 1961); *Sandez v. United States,* 239 F. 2d 239 (9th Cir. 1956).

B. The Court Properly Permitted the Trial to Proceed in Appellant's Absence.

Rule 43 of the Federal Rules of Criminal procedure provides in part that "[i]n prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict."

In *Cross v. United States,* 325 F. 2d 629, 631 (D.C. Cir. 1963), it was said that the purpose of this provision "is to prevent frustration of a trial in progress by the escape or absconding of the defendant."

Appellant's brief (p. 20) mistakenly states that neither the Government nor the Court made any effort to determine why Phillips was absent from the trial, and that the Court's finding that appellant's absence was voluntary was not supported by any fact.

Actually, when appellant failed to appear at 9:45 a.m. on Friday, April 19, 1963, as instructed at the conclusion of court the day before, the convening of court was delayed for an hour. [R. T. 375, 379.] Thereafter, the Court convened and held a hearing to determine why appellant was absent, during which Mrs. Phillips testified under oath that Phillips had accompanied her to the courthouse that morning and had said he would be inside shortly. [R. T. 381.] Because of the possibility that appellant might have been unavoidably absent, the Court then continued the case for three days to Monday, April 22, 1963. [R. T. 381, 382.] At the request of appellant's attorney and bondsman, the Court forfeited appellant's bond and issued a bench warrant for his arrest on April 19, 1963. [R. T. 382, 383.] Defense counsel advised the Court that the bondsman would make every effort to locate Phillips [R.T. 382], and the Court asked that information as to his whereabouts be relayed to the F.B.I. [R. T. 410], who had an all points bulletin out for him [R. T. 413]; but no one was able to locate appellant.

On Monday, April 22, defense counsel advised the Court that appellant had contacted his bondsman over the week-end, and told him that appellant would be present in court at that time; however, appellant did not appear. Defense counsel also informed the Court that appellant had failed to make a required appearance in a State court that same morning. [R. T. 389, 409.]

Under these circumstances, and since appellant never communicated with his counsel, the Court, or the Government as to his absence from the trial, the Court found that the absence was voluntary. [R. T. 412-413.]

It should be pointed out that when a defendant is in custody during trial, the Government has a duty to see that he is brought into court so that he may be present during the trial. *Cross v. United States,* 325 F. 2d 629 (D.C. Cir. 1963); *Evans v. United States,* 284 F. 2d 393 (6th Cir. 1960). However, when a defendant is on bond during a trial, it would seem that he has some obligation to appear at the times appointed by the Court, or if he is unable to do so, to communicate with the Court or counsel concerning his absence if at all possible. This, appellant never did.

Under the circumstances, the Court did all that it could to determine why Phillips was absent. Until Phillips was located and questioned, there was no further way to determine whether his absence was voluntary or not. To require the Court to await apprehension of an apparent fugitive before finding that his absence was voluntary and proceeding with the trial would permit the frustration of a trial in progress by the escape or abscondance of the defendant contrary to the purpose of Rule 43.

Since the Appellant's Brief (p. 20) goes outside the record in stating that appellant was absent from trial because he was kidnapped, the Government wishes to point out that the Probation Officer's pre-sentence report on appellant indicates that Phillips was apprehended by police, several days after his disappearance, in a Hollywood motel room that was being used as a base for check passing activity, and at that time, Phillips had fictitious checks and identification in his possession.

C. The Argument of Goverment Counsel Was Unobjectionable.

Only in cases of clear abuse by a district attorney should a conviction be set aside because of improper argument. *United States v. Redfield,* 197 F. Supp. 559 (D. Nev. 1961), *aff'd* 295 F. 2d 249 (9th Cir. 1961), *cert. denied* 369 U. S. 803 (1962); *Brennan v. United States,* 240 F. 2d 253 (8th Cir. 1957), *cert. denied* 353 U. S. 931 (1957); *Weiss v. United States,* 122 F. 2d 675 (5th Cir. 1941), *cert. den.* 314 U. S. 687 (1942). For example, in *Iva Ikuko Toguri D'Aguino v. United States,* 192 F. 2d 338 (9th Cir. 1952); *cert. denied* 343 U. S. 935 (1952), it was held that the Government's argument that the prosecution should serve as a warning to others that they cannot desert their country and adhere to the enemy with impunity did not constitute such misconduct as to require a new trial.

Appellant's brief (p. 8) states that "prosecution counsel argued to the jury that since appellant's accomplices had been convicted, appellant also ought to be punished," and cites in support of this contention two short quotations from the Government's argument which are taken out of context, and one of which has been carefully edited. (Appellant's Br. p. 21.) Nothing could be further from the truth.

The first quotation was taken from among the Government's comments on the credibility of Phillips' story that he had engaged in his check activity only because Officer Irwin had threatened to return him to prison as a parole violator, during the course of which the prosecutor stated:

> "The defendant has served three years eight months of a five year sentence. All he has left is

a year and four months. But he is risking all this nation-wide check activity to stay out of jail a year and four months. Do you believe that?

"Also, you heard the list of names I read off this morning, and he said 'yes,' 'yes,' 'yes,' 'he worked for me,' and so forth.

"Maybe you didn't count them. Mr. Phillips said there were eleven, he admitted to eleven, and the twelfth man, Mr. Boss, or White, I forget his last name, was denied by Mr. Phillips. But Mr. Roux says to the contrary. Anyway, the vast portion of those I think Mr. Phillips stated were in jail. So here Mr. Phillips, he is going to keep out of jail by passing checks all over the country, but he gets the whole ring in jail *and himself in trouble as well.*[2] Mr. Phillips, of course, has told different stories before." [R. T. 367-368.]

The second quotation is carefully lifted from the Government's comments about whether the whole nature of the fictitious check operation shed any light on whether it was set up by an unwilling victim of Officer Irwin's threats, or was the creation of a man eager to make some easy money. In the course of these remarks, the prosecutor said:

"I think the clincher on all that is just look at the operation and ask yourself one question: Is this the setup of a man who doesn't have his heart in his work? And look at it. The work of an unwilling, reluctant man who is dragging his feet every step of the way?" [R. T. 369.]

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[2]The italicized portion of this sentence was conveniently omitted from appellant's quotation.

Thereafter, the prosecutor recounted the various facets of the check operation including the printing operation that Phillips had set up in Mexico, the couriers who delivered the checks, the numerous types and amounts of checks printed, the dozen or more persons recruited to pass the checks, the fictitious identification supplied by Phillips, the nationwide scope of the passing operation, the fact that Phillips usually got at least 50% of the proceeds, Phillips' role in the operation, and the police protection, attorneys, and bail bondsmen who were said to be available to the ring. [R. T. 369-372.] The prosecutor concluded that "[i]t is not a fly-by-night scheme that Mr. Irwin kicked Mr. Phillips into. A well thought out master plan by the master planner, namely William Ross Phillips." [R. T. 372.]

The immediate context from which the remarks objected to were taken is as follows:

> "What was Phillips' role in this operation? Well he took care of the printing, he took basic care of the idea. He took care of the cashing, in the sense that he furnished them one check at a time and got the money back. I suppose—remember Craig in New York ran off with the proceeds. Maybe it is not good to hand out 20, you have got to give them one at a time. Phillips was cautious. He handed out one at a time and took the proceeds and gave another one. He never signed any of them. He never passed any of them. He did some typewriting that is hard to identify, but he never signed or cashed any of them. *Phillips is in the background. He is protecting himself.*

> *Let these other twelve guys get in jail, like they are, but Phillips, no*[3] Remember, too, the interesting comments you heard about attorneys and bail bondsman for the people who are arrested." [R. T. 371-372.]

The above quotation consists of argument to establish that the check activity was conducted willingly by Phillips with the care and planning of a business operation, and that it was not the reluctant result of threats by Officer Irwin. Defense counsel made no objection to any remarks of the Government, and therefore an allegation of error should not be considered on appeal. *Kreinbring v. United States,* 216 F. 2d 671 (8th Cir. 1954). At no time did the Government argue that because his accomplices were in jail, Phillips should also be punished.

It is to be noted that although the prosecution never made the argument that appellant alleges, the defense did argue, in effect, that since Irwin was not prosecuted, Phillips should not have been prosecuted either. [R. T. 351-352.]

D. Evidence Bearing Upon Appellant's Offenses, or His Motive, Intention, Knowledge, Plan and Design, or Showing the Absence of Coercion, Was Properly Received.

Rule 18(2) of the Rules of the United States Court of Appeals for the Ninth Circuit provides in pertinent part that:

> "This [appellant's] brief shall contain in order here stated—
>
> * * * * *

[3]Only the italicized portion is quoted by appellant.

"(d) In all cases a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged. When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found."

Inasmuch as appellant's brief does not comply with the requirements of Rule 18(2)(d), the Government sets forth the following:

After Roy Sanchez testified without objection that he had seen Phillips stopped by the Border Patrol and had notified Mrs. Phillips about it [R. T. 44-45] the following occurred:

"Q. What did you tell her and what did she tell you? We offer this as the statements of a partner to the common scheme and plan, which we will establish.

"Mr. Parsons: We object on the ground it is hearsay, and at this time I move to strike the testimony so far as irrelevant, incompetent and immaterial to any issue set forth in this case. It is not material. I have not heretofore objected, because I had to, of necessity, hear it. It is immaterial to any issue here.

"The Court: The motion is denied. The objection is sustained.

"Mr. Nissen: As to what, sir?

"The Court: The objection to this conversation with his wife." [R. T. 45.]

After Robert Roux had testified without objection that he had traveled to cities other than Phoenix to cash money orders furnished by Phillips [R. T. 96] the following occurred:

"Q. Let's take them one at a time. Did you ever see Mr. Phillips in St. Louis while you were there?

Mr. Parsons: To which we object as immaterial, irrelevant, to anything charged in this case.

Mr. Nissen: We offer it as scheme and plan. Since our indictment charges the causing. We are trying to show the relationship between Mr. Phillips and this witness who admits his participation.

The Court: The objection is overruled.

* * * * *

A. Yes sir. We flew to St. Louis, George Myers and I and our wives, flew on a Saturday night. Mr. Phillips was supposed to come to St. Louis and meet us Sunday, but something went wrong where he didn't get there, I believe it was, until Tuesday morning. And we all met at the Lennox Hotel in St. Louis. And we tried to cash some checks in St. Louis, Mr. Phillips and I, and George Myers and his brother Don Myers, but we didn't cash any in St. Louis.

Q. What kind of checks were those.

A. United California money orders. I cashed one check at the Lennox Hotel." [R. T. 96-97.]

The two objections quoted above are the only ones mentioned in appellant's specification of error number 5. (Appellant's Br. p. 11, lines 10-12.) The first objection was sustained, although defense counsel's mo-

tion to strike testimony previously received without objection was denied. This motion was properly denied inasmuch as the prior testimony concerned Phillips' establishment of the printing operation in Mexico which later produced the United California Bank money orders that were cashed in Phoenix by Roux and George Myers; and this testimony was clearly material.

The second objection pertained only to whether Roux had seen Phillips in St. Louis. Substantially the same evidence was elicited from George Myers without objection. [R. T. 145-146.] In fact both Roux and Myers testified without objection to traveling to various cities in order to cash money orders [R. T. 96-97, 145-146] and defense counsel questioned them as to various aspects of these trips not gone into on direct examination. [R. T. 105, 117, 120, 149-150.] In view of this, appellant should not be able to attack the admission of this evidence on appeal. *Gilbert v. United States,* 307 F. 2d 322 (9th Cir. 1962); *Ramirez v. United States,* 294 F. 2d 277 (9th Cir. 1961).

Furthermore, the testimony appellant complains of (Appellant's Br. p. 10, line 15, through p. 11, line 6) would have been admissible even over a defense objection. Sanchez' testimony about Phillips' arranging the Mexican printing operation was admissible as a necessary aspect of establishing that the United California Bank money orders referred to in the indictment were counterfeited and were traceable to Phillips. *Kobey v. United States,* 208 F. 2d 583 (9th Cir. 1954); *Schwartz v. United States,* 160 F. 2d 718 (9th Cir. 1947).

Testimony as to Phillips' check ring activities in other cities, similar to and at about the same time as his operation in Phoenix, were admissible to show

motive, intention, knowledge, plan and design, and to negative a defense of coercion. *Carr v. United States,* 317 F. 2d 409 (9th Cir. 1963); *Carbo v. United States,* 314 F. 2d 718 (9th Cir. 1963); *Enriquez v. United States,* 314 F. 2d 703 (9th Cir. 1963); *Bible v. United States,* 314 F. 2d 106 (9th cir. 1963); *Stewart v. United States,* 311 F. 2d 109 (9th Cir. 1962); *Corey v. United States,* 305 F. 2d 232 (9th Cir. 1962), *cert. denied* 371 U. S. 956 (1962); *Benchwick v. United States,* 297 F. 2d 330 (9th Cir. 1961); *Medrano v. United States,* 285 F. 2d 23 (9th Cir. 1960), *cert. denied* 366 U. S. 968 (1961); *Sachs v. United States,* 281 F. 2d 189 (9th Cir. 1960), *cert. denied,* 364 U. S. 909 (1960).

Mrs. Roux's testimony that Phillips threatened her when she was arguing with her husband over Roux's involvement in the check ring was relevant to show his motive and intention, and whether he was acting under duress. *Stewart v. United States,* 311 F. 2d 109 (9th Cir. 1962), and cases cited in paragraph above. The jury was informed that this was the manner in which Mrs. Roux's testimony was relevant, when the Government said in final argument: "And is a person who is in business against his will going to go around threatening people? Or would he say, 'I am sorry, I don't want to be in this any more than you do, but I have got to save my neck.' "

VI.
CONCLUSION.

For the reasons stated above, the judgment of conviction should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

David R. Nissen